Supreme Court, U.S.
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Nos. 97-829, 97-830, 97-831

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT GST TELECOM, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The questions presented are identified in the Briefs filed by Petitioners.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are identified in the Briefs filed by Petitioners.

Pursuant to Supreme Court Rule 29.6, Respondent states as follows:

GST Telecom, Inc., is wholly owned by GST USA, Inc., which is wholly owned by GST Telecommunications, Inc., a publicly held Canadian Corporation, whose common stock is traded over the American and Toronto Stock Exchanges.

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BRIEF OF RESPONDENT GST TELECOM, INC. IN SUPPORT OF PETITIONERS

Respondent GST Telecom, Inc., respectfully submits this Brief in Support of Petitioners.

OPINIONS BELOW

The opinions below are identified in the Briefs filed by Petitioners. They are reproduced in the Petitioners' Appendix.[1]

JURISDICTION

The basis for this Court's jurisdiction is set forth in the Briefs filed by Petitioners.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are identified in the Briefs filed by Petitioners. They are reproduced in the Petitioners' Appendix.

STATEMENT OF THE CASE

Respondent GST Telecom, Inc. (GST), vigorously supports the various petitioners, especially the Federal Communications Commission (FCC), who have requested that this Court undo the Eighth Circuit Court of Appeals' policy foray into the joyously dynamic and utterly technical world of competitive telecommunications. In essence, the Court of Appeals stepped into the vortex of telecommunications reform set into motion by the Telecommunications Act of 1996 (Act), Pub. L. No. 104-104, 110 Stat. 56, and, seizing upon disparate statutory elements that might have appeared comfortably traditional, apparently engaged in an act of interpretation without regard to

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[1] Petitioners' Appendix (hereinafter "Pet. App.") refers to the appendix to the petition for a writ of certiorari in *AT&T Corp., et al. v. Iowa Utilities Board, et al.*, Docket No. 97-826, which seeks review of the same judgment as Petitions for Writ of Certiorari filed by Petitioners Association for Local Telecommunications Services, *et al.*; MCI Telecommunications, Inc.; and Federal Communications Commission and United States of America, and which has been adopted by said petitioners.

the 1996 Act's design as a whole. Unfortunately, the Court of Appeals failed to recognize that this heavily brokered body of reform legislation more closely compares to a grand mosaic where the whole masterfully exceeds the sum of its parts.[2] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997).[3]

Consistent with Congress's general desire to "encourage the rapid deployment of new telecommunications technologies" and "secure lower prices and higher quality services for American telecommunications consumers," 110 Stat. 56, 56 (1996), the overall legislation constitutes a comprehensive plan for displacing local telephone monopolies with competition and choice. Without a doubt, the legislation also constitutes a no-nonsense approach to catapulting a new class of telecommunications providers—competitive local exchange carriers (CLECs)—into the local exchange marketplace. Thus, Congress dramatically altered the national telecommunications landscape when it redefined the status quo through four key provisions that ended more than six decades of the old guard's co-dependence on captive rate-payers in the non-competitive local exchange environment.

The Act's key provisions (1) conferred explicit authority on the FCC to complete all actions necessary to establish regulations that would govern interconnection agreements between incumbent local exchange carriers (ILECs) and CLECs; (2) established a procedural

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[2] Indeed, in an *amici* filing submitted to the Court of Appeals to counterbalance a prior *amici* filing by four members of the House, six members of the House and Senate confirmed that "the Act was the product of many successful compromises among a variety of competing views and interests, and reflects the customary give and take of the legislative process." Brief of Amici Curiae Bliley, *et al.* at 3, *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997) (No. 96-3321). Excerpts of the Brief have been lodged with the Court.

[3] The text of the Court of Appeals' decision has been submitted to the Court in Pet. App. at 1a-67a.

framework requiring state public utility commissions (PUCs) to arbitrate failed interconnection negotiations between ILECs and potential competitors; (3) conferred jurisdiction on the FCC to preempt enforcement of any legal requirement that would interfere with the ability of any telecommunications service provider to provide any interstate or intrastate telecommunications service; and (4) established a basis for permitting the Bell operating companies (BOCs)—who presently qualify as the nation's preeminent ILECs—to petition the FCC for authority to provide long distance telephone services. *See generally* 47 U.S.C. §§ 251, 251(d)(1), 252, 253, and 271.

As the FCC and the other various petitioners have demonstrated, the Court of Appeals—at the behest of a consortium of ILECs and state PUCs—invalidated a number of central rules the FCC adopted pursuant to its congressional mandate to establish implementation regulations governing interconnection. Looking backwards to pre-Act rulings governed by the question of whether telephone service amounted to interstate or intrastate service, the Court of Appeals was somehow persuaded that the FCC's pricing methodology governing interconnection qualified as purely intrastate regulation beyond the FCC's jurisdiction limits.[4] (Pet. App. at 8a-24a.) In another surprising instance, the Court of Appeals substituted its policy judgment for the FCC in vacating the so-called "pick and choose" rule, which entitled CLECs to select the more favorable terms an ILEC may have extended to other parties in prior interconnection agreements. (Pet. App. at 24a-27a.) Finally, on rehearing, the Court of Appeals vacated an FCC rule that prohibited ILECs from

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[4] Prior to the Act, the notion of FCC interstate jurisdiction related to long distance toll traffic that crossed state lines, while intrastate jurisdiction applied to in-state long distance toll traffic and local exchange service. On its face, the Act has blurred this "traditional" jurisdictional dividing line into extinction, as it expressly places the FCC at the helm of establishing interconnection rules to implement local exchange competition.

separating preexisting combined network elements. (Pet. App. at 70a-71a.) As a result of this most recent ruling, competitors providing service through purchased combinations of an ILEC's unbundled network elements can no longer obtain these elements on a less costly combined basis.

To avoid belaboring this Court with overly redundant briefings, respondent GST adopts and incorporates by reference the citations, arguments, and statutory and case analyses submitted by the FCC and the various other petitioners. GST's briefing aims to support and supplement the petitioners' compelling filings with a ground-level CLEC perspective as to what the Act means and why the Court of Appeals (1) erred in determining the FCC exceeded its jurisdictional limits in establishing a pricing methodology governing interconnection; and (2) abused its discretion in vacating the FCC's pick and choose rule, which falls within the ambit of both congressional intent and the plain language of § 252(i).[6] 47 U.S.C. 252(i).

SUMMARY OF ARGUMENT

The Court of Appeals erred in holding that the FCC exceeded its jurisdiction in establishing pricing principles relating to interconnection, as the plain language of sections 251(c)(2) and 251(c)(3), when read *in pari materia*

[6] Conducting business as a CLEC throughout the Western United States and Hawaii, GST has relied upon the dictates of the Act to deploy local exchange switches and fiber optic networks in states ranging from Idaho, to New Mexico, to California, to Hawaii, and in cities from Boise and Spokane, to Tucson and Honolulu, to name but a few. More significantly, GST epitomizes what the future of telecommunications is all about as it integrates a full panoply of services into a "one-stop shop," where consumers obtain their local, long distance, and data services from the same carrier over the same network facilities. CLECs like GST, however, still require dominant carriers to provide reasonably priced, nondiscriminatory interconnection and unbundled network elements, so GST's customers can place telephone calls to customers who subscribe to competing carriers.

with section 251(d)(1), compels the FCC to adopt such pricing standards. *See* 47 U.S.C. §§ 251(c)(2), 251 (c)(3), and 251(d)(1). In essence, the plain language of section 251(d)(1) unambiguously empowers the FCC to complete "all actions necessary to establish regulations to implement" section 251, which features express requirements relating to pricing at sections 251(c)(2) and 251 (c)(3). Section 251—and the panoply of FCC interconnection regulations it anticipates—easily qualify as the heart of the Act. Thus, in adopting a pricing methodology to prevent the former monopolists from imposing unreasonable costs for interconnection, the FCC complied with the dictates of the Act and fulfilled congressional intent.

To reach its erroneous conclusion, the Court of Appeals, looking backward to pre-Act "tradition" that limited FCC jurisdiction to interstate toll traffic, failed to apprehend that the Act, in its totality, constitutes a comprehensive paradigm shift that renders the former interstate-intrastate dichotomy meaningless. Indeed, as a body of reform legislation calculated to integrate regulated local exchange monopolists into unregulated local markets, the Act codifies the interconnection process as a matter of national law and policy. In misapprehending the breadth and purpose of this ground-breaking statutory design, the Court of Appeals erred as a matter of law in limiting the FCC's jurisdiction on the issue of pricing principles.

Finally, the Court of Appeals abused its discretion when it vacated the FCC's "pick and choose" rule, which, as a matter of the FCC's informed policy judgment, permitted new entrants to obtain "any interconnection, service, or network element provided under an [existing] agreement" without having to accept all other terms of such an agreement. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499 (1996) (First Report and Order), Pet. App. at 261a-268a. Such a rule would have impeded the ILECs' tendency to discriminate against new entrants in the pricing of facilities—especially where the new en-

trants stand at the mercy of the ILECs' bottleneck control and superior bargaining power. The Court of Appeals should have given deference to the FCC's greater contextual experience in adopting such a rule, which was also consistent with the congressional intent expressed at section 252(i).

ARGUMENT

I. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN DETERMINING THAT THE FCC EXCEEDED ITS JURISDICTIONAL LIMITS IN ESTABLISHING A PRICING METHODOLOGY TO CALCULATE THE COSTS INCUMBENT CARRIERS INCUR IN OPENING THEIR FACILITIES TO COMPETITORS.

A. The Court of Appeals Erred in Favoring Pre-Act Section 2(b)(1) Over a Comprehensive Array of Interconnection Provisions That Plainly Empower the FCC To Establish Pricing Principles Relating to Interconnection Under the Act.

First and foremost, the Court of Appeals' opinion frustrates section 251's fundamental purpose of advancing the Act's goals. Section 251—as a matter of federal law—establishes a mandatory duty requiring the ILECs to (1) provide competing carriers with nondiscriminatory network interconnection; (2) provide unbundled network elements at just, reasonable, and nondiscriminatory prices; and (3) resell services to other carriers at wholesale rates on a nondiscriminatory basis. *See generally* 47 U.S.C. §§ 251(c)(2), 251(c)(3), and 251(c)(4). Even more significantly, section 251(d)(1) directs the FCC to "complete all actions necessary to establish regulations to implement the requirements" of section 251 within six months of enactment.

The plain language of section 251(d)(1), in particular, gives rise to three critical policy inferences germane to this case. First, this provision imposes a no-nonsense, six-

month time line that confirms Congress's commitment to bring about network interconnection among competing carriers on a fast-track basis. For all intents and purposes, Congress ordered the FCC to embark upon an all-out, light-speed mission to promulgate a sweeping body of revolutionary regulations grounded in technical requirements and antitrust considerations.[6] Secondly, in commissioning the FCC, a federal agency, to promulgate the interconnection rules, Congress ordained that interconnection in the local exchange constitutes a matter of compelling national interest.

Finally, and most pertinent of all, the plain language of section 251(d)(1) unambiguously establishes the FCC as *the* regulatory body broadly empowered to complete "all actions necessary" to establish the regulations envisioned under section 251, including, presumably, the express requirements set forth at sections 251(c)(2) and 251(c)(3). Among other things, these subsections require that the ILECs provide interconnection and unbundled network elements "on rates, terms, and conditions that are just, reasonable and nondiscriminatory"—especially as they relate to the requirements set forth in sections 251 *and* 252. Thus, the Court of Appeals should not have held that the FCC exceeded its jurisdiction in establishing pricing principles relating to interconnection, as the plain language of sections 251(c)(2) and 251(c)(3), when read in conjunction with section 251(d)(1), compels the FCC to adopt such pricing standards.

For any new CLEC having to contend with unyielding ILECs and uncertain state PUCs, section 251(d)(1) presents distinctively straightforward policy implications that help to explain why Congress looked to the FCC to establish the Act's interconnection rules. Aside from its obvi-

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[6] The six-month deadline also signaled the ILECs not to slow roll or otherwise retard the work of the FCC, which, in a monumental display of government alacrity and efficiency, rose to the occasion in enlightened and decisive fashion. *See* First Report and Order, Pet. App. 131a-337a.

ous goal of achieving national coherence and uniformity—thereby avoiding regulatory fragmentation—in the interconnection process, the overall legislation diplomatically takes into account the likely reality that, in the wake of the Act, too many state PUCs would face capability issues that would retard the process. As it turned out, following enactment, many state PUCs found themselves underbudgeted, understaffed, uncertain and even unwilling to contend with the paradigm shift wrought by the Act.[7] Others made their way to the Court of Appeals to defend both their "turf" and a largely meaningless pre-Act intrastate "tradition" that no longer prevails in the post-Act era of federally imposed local competition—to say nothing of integrated telephony service providers.

Significantly, by its plain terms, the Act authorizes the FCC to preempt any state access or interconnection order that is inconsistent with section 251 or substantially prevents section 251's implementation. In this regard, the Act establishes a minimum federal standard relating to interconnection-related issues, which dovetails with the FCC's jurisdiction and its authority under the Act to preempt any state or local law or rule that imposes a requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide interstate *or* intrastate telecommunications service. 47 U.S.C. §§ 251(d)(3),

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[7] After more than two years since enactment, some state PUCs have only fairly recently opened cost dockets relating to pricing and interconnection issues. Though such regulatory delays hardly qualify as extraordinary in a context accustomed to monopoly precepts, they are frustrating to investors and murderous to the business case of competitive companies. The Act as a whole, however, contains critical short-term deadlines, demonstrating that Congress meant business in tearing down the time barriers to entry that might impede competitive intrastate telecommunications service. Thus, instead of leaving the job to 50 state PUCs of varying degrees of commitment and ability to wrangle with it, Congress assigned the fast-track interconnection rule-making to the single federal agency with the expertise and wherewithal to ensure timely compliance.

253(a) and 253(d). Again, taken as a whole, the plain language of the Act underscores the FCC's agency expertise and broad powers to construe and implement the Act's interconnection requirements—whether they relate to interconnection pricing policies or to conditions surrounding unbundled access—and to construe and preempt legal and economic barriers to entry.

Despite the Act's comprehensive plan to bring about competition, compel interconnection, and expand the FCC's inherent antitrust role in integrating former regulated monopolists into unregulated local markets, the Court of Appeals resorted to traditional principles of public utility regulation to limit the FCC's jurisdictional authority under the Act. That is, the Court of Appeals looked to section 2(b)(1), a holdover provision from the Communications Act of 1934. Adopted 64 years ago when local exchange telecommunications was considered a natural monopoly, section 2(b)(1) generally precludes the FCC from asserting jurisdiction with respect to "charges" or "regulations" for or in connection with intrastate communication service. Even though the 1996 Act expressly and unambiguously empowers the FCC to compel interconnection and the offering of unbundled network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory," the Court of Appeals determined that the FCC could not exercise this authority unless Congress expressly overrode or modified section 2(b)(1) as it related to limiting the FCC's intrastate authority. *See generally* 47 U.S.C. §§ 2(b)(1), 251(c)(2)(D), 251(c)(3), and 251(d)(1); and *Iowa Utilities Board v. FCC*, Pet. App. at 16a-17a. The Court of Appeals then unreasonably concluded that "the Act does not demonstrate an unambiguous grant of intrastate authority to the FCC." Pet. App. at 17a.

Even if the interconnection requirements that are the subject of the FCC Orders were purely intrastate in character—which Petitioners have persuasively shown they are not—the Court of Appeals' reliance on section 2(b)(1)

would still be misplaced. Given that section 251 expressly empowers the FCC to "complete all actions necessary to establish regulations to implement the requirements" of section 251, and the very same section 251 expressly mandates that ILECs provide interconnection and access to unbundled network elements "on rates, terms, and conditions that are just, reasonable and nondiscriminatory," the Court of Appeals erred in ignoring plain language that empowers the FCC to promulgate pricing principles governing the interconnection process.

B. The Court of Appeals Failed To Apprehend That the Act Dramatically Redefined the States' Role in Implementing Interconnection.

While the Act at section 251 places the FCC in the central role of fashioning federal regulations and enforcing congressional intent as it relates to interconnection in both the interstate *and* intrastate contexts, Congress also saw fit to transform dramatically the role of the state PUCs. Under the old monopoly paradigm, the state PUCs served as public interest watchdogs ensuring that the ILECs spent their money prudently and enjoyed a reasonable and fair rate of return. Thus, in subjecting the monopolists to cost justification and analyzing their requests for rate increases, the state PUCs sought to keep the ILECs solvent while at the same time protecting consumers from unreasonable pricing. Over the years, under the auspices of federal regulations that established elaborate accounting procedures and cost allocation methods, the whole system evolved into a complex game of cat and mouse where the ILECs inundated state regulators with reams of accounting data and an onslaught of "expert" testimony that promoted intricate and outcome-determinative methodologies for computing the desired result. One way or another, either the consumer or the taxpayer paid for this costly exercise, while the reviewing courts astutely left the whole mess to the regulators to set pricing policies and cross-examine the numbers.

Under the Act, however, the state PUCs now preside over the procedural framework that subjects the ILECs to an arbitration process if the parties fail to reach an interconnection agreement within less than six months of initiating interconnection negotiations. 47 U.S.C. § 252(b). Still serving as public interest watchdogs, the state PUCs must now ensure that the ILECs, who enjoy lopsided bargaining power and control the local loops, do not engage in anticompetitive behavior and abuse their bottleneck control over the local exchange market.[8] As the FCC rightly contended in its petition for certiorari, the Act has linked the FCC and state PUCs in "concurrent and complementary pricing roles in fostering competition in local telephone markets," FCC Pet. at 15. In this relationship, the state PUCs must consider specific facts and issues presented for arbitration, and ensure that, in resolving any open issues and imposing conditions upon the parties to the agreement, "such resolution and conditions meet the requirements of section 251, *including the regulations prescribed by the [FCC] pursuant to section 251.*" 47 U.S.C. § 252(c)(1) (emphasis added). Thus, as the other petitioners aptly argued to the Court of Appeals, the FCC and the state PUCs share significant collaborative partnership responsibilities in achieving the Act's goals—with the FCC establishing the overall principles that the state PUCs must apply to ensure that ILEC rates are "just, reasonable, and nondiscriminatory."

Accordingly, the Court of Appeals had no basis to limit the FCC's jurisdictional authority to fashion rules relating to the interconnection process, and should have rejected the jurisdictional issue as an unfounded collateral attack on substantive and well-grounded telecommunications policy that was squarely within both the mandate of the Act and the ambit of the agency's expertise. By convincing the Court of Appeals that the FCC's "pricing" policies jurisdictionally belonged on the "traditional" side of the

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[8] "Local loop" refers to the wires that extend from the carrier's switch to the customer's telephone.

intrastate equation, the ILECs and state PUCs effectively blocked the FCC from implementing interconnection and unbundling rates based on a forward-looking cost standard that represented the most just, reasonable and nondiscriminatory basis for developing competitive markets consistent with the purposes of the Act in general, and section 251 in particular.

Even more disconcertingly, if the Eighth Circuit's decision is allowed to stand, the ILECs will have opened the door to the historical abuses associated with playing the numbers and advocating stacked methodologies that will support the recovery of their "embedded costs"—in each and every state PUC. Many state PUCs have already adopted the FCC's forward-looking cost approach, and others will be expected to follow, but the issue will not go away, bringing about more delays and endless litigation. Thus, while the Court of Appeals may have viewed the case presented as a turf battle, its erroneous decision derailed a substantive interconnection policy, thereby impeding the Act's momentum and the nation's prospects for effective long-term competition.

C. The Court of Appeals' Erroneous Decision Undermines the Balance of Interests That Congress Established To Ensure a Rapid Transition to Competition.

To be sure, as part of the compromise process that surrounded the give and take of the Act's legislative genesis, the BOCs, who dominate the nation's local exchange service areas, hardly walked away from the table with hat in hand expressing melancholy regrets of Paradise Lost. To the contrary, in exchange for their cooperation in opening long-established networks and local loops to potential competitors, the Act allows the BOCs to enter the lucrative long distance business upon demonstrating compliance with the Act's competitive checklist at section 271(c)(2)(A). Given the BOCs' long-standing dominance in the local exchange market, generations of loyal local service customers will be expected to sign on as

BOC long distance customers as well, giving the BOCs an extraordinary incentive to slow roll any CLEC desiring both interconnection and a running start in developing market share. This provision warrants mention and the Court's consideration for two compelling reasons: first, given that the Act sets the stage for the integration of local and long distance services through the nation's dominant carrier facilities, it dispels any lingering doubt on the question of whether the Court of Appeals erred in hanging its hat on pre-Act notions of intrastate turf; second, it reinforces, once again, the time-sensitive exigencies structured into the Act and demonstrates why Congress was uncompromising in giving the FCC broad powers to get the job done.

II. THE COURT OF APPEALS ABUSED ITS DISCRETION IN VACATING THE FCC'S "PICK AND CHOOSE" RULE, AND ALSO FRUSTRATED CONGRESSIONAL INTENT EMBODIED IN THE PLAIN LANGUAGE OF SECTION 252(i).

Finally, in throwing out the FCC's "pick and choose" rule, the Court of Appeals, responding to what it perceived as the probable carrier behavior in negotiating interconnection agreements, simply substituted its own uninformed policy judgment for Congress's due deliberation. Section 252(i) provided the FCC with the statutory basis to establish a requirement permitting CLECs to select the more favorable terms an ILEC has extended to other parties in prior interconnection agreements, but—remarkably—the Court of Appeals concerned itself with whether such an approach would "discourage the give-and-take process that is essential to successful negotiations." Pet. App. at 26a.

Section 252(i), however, plainly requires the ILECs to "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and con-

ditions as those provided in the agreement." 47 U.S.C. § 252(i). Petitioners have cogently explained why the Court of Appeals' interpretation constitutes a patent violation of the doctrines established by this Court in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). From a CLEC perspective, given the ILECs' superior bargaining power, bottleneck control, and consistent tendency to discriminate against new entrants, the FCC reasonably construed section 252(i) to give new entrants the right to obtain "any interconnection, service, or network element provided under an [existing] agreement" without having to accept all other terms of such an agreement. Pet. App. at 261a-268a. Moreover, in a legislative discussion of an earlier version of section 252(i), Congress confirmed that such a requirement was, among other things, necessary to "prevent discrimination among carriers." *See* S. Rep. No. 104-23 at 21-22 (1995). Thus, to the extent that the Court of Appeals' view rests on the assumption that ILECs negotiate fairly, it reflects contextual inexperience at odds with congressional intent, the FCC's agency expertise, and this CLEC's day-to-day reality in contending with the ILECs' friendly but ponderous foot-dragging in providing interconnection—which, given their motive to delay competition, they have raised to the level of performance art.

More problematically, in vacating the "pick and choose" rule, the Court of Appeals not only abused its discretion, but undermined the FCC's inherent antitrust role in integrating former regulated monopolists into unregulated local markets.

CONCLUSION

For the reasons stated, Respondent GST Telecom, Inc., requests that this Court reverse the Eighth Circuit Court of Appeals on the issues presented by Petitioners MCI Telecommunications Corporation; the Association for Local Telecommunications Services, *et al.*; and the Federal Communications Commission and United States of America.

Respectfully submitted,

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